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No. 59

In the Supreme Court of the United States

OCTOBER TERM, 1968

DONALD SOMERVILLE and MARJORIE KULLERSTRAND,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition For A Writ of Certiorari To The Appellate Court of Illinois, First Judicial District.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioners properly invoked the jurisdiction of this court under Title 28 U.S.C. §1257(3). In their brief submitted to the Illinois Appellate Court, Appellants urged, as they do here, that having been twice tried for the same offense, their second trial violated the prohibition against double *jeopardy*. Both the United States and Illinois Constitutions speak in these very words. "Nor shall any person be subject for the same offense to be twice put in jeopardy." U.S. Constitution Amendment V. "No per-

son shall * * * be twice put in jeopardy for the same offense." Illinois Constitution, Article 2, Section 10.

Similarly, Point I of petitioners' reply brief stated that, "The jury having been sworn and impaneled, it was double jeopardy to retry the defendants." The entire argument on this point relied on *Downum* v. *United States,* 372 U.S. 734 (1963), in which this Court reversed a forgery conviction while holding defendant's trial violated the Fifth Amendment prohibition against double jeopardy.

While petitioners might have invoked the Federal constitutional guarantee more explicitly than they did, this Court has not denied jurisdiction where an appellant's argument could easily be interpreted as raising a federal question. In *Braniff Airways* v. *Nebraska State Board of Equalization and Assessment,* 347 U.S. 590 (1954) for example, Mr. Justice Reed, speaking for the majority, stated:

> (A)ppellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented. 74 S.Ct. 757 at 763.

True to this spirit, this Court granted certiorari and decided *Douglas* v. *Alabama,* 380 U.S. 415 (1965). At trial, defendant's attorney objected to the prosecutor reading in open court a convicted witness' confession on the grounds that this reading was not subject to cross-examination. 85 S.Ct. 1074 at 1078 n. 4. The Alabama Appellate Court affirmed defendant's conviction, while holding that he had waived this issue by failing to object repeatedly throughout the reading of the statement. 160 So. 2d 477.

Finding the state procedural ground of decision inadequate, and finding further that a federal question had been raised and preserved, this Court granted certiorari. Defendant's simple assertion before the Alabama trial and appellate forums that the prosecutor's action denied defendant the right to cross-examine was deemed sufficient to have raised a question of the applicability of the Sixth Amendment's confrontation clause to state prosecutions.

Petitioners herein were much more diligent about raising and preserving their federal question than was Douglas. They objected strenuously both at trial and before the Illinois Appellate Court that they had been twice placed in jeopardy, in words closely conforming to those of the Fifth Amendment. Since the issue was decided adversely to petitioners in the Appellate Court and since the Illinois Supreme Court declined to hear the case, petitioners now properly seek review of their convictions by writ of certiorari.

In its brief in opposition to the petition for a writ of certiorari, respondent argues that a reconsideration of *Palko* v. *Connecticut*, 302 U.S. 319 (1937), by this Court would be both unwise and unnecessary. The lack of merit of this contention was made clear during the last term of this Court when certiorari was granted in *Benton* v. *Maryland*, 3 Cr. L. 4103, on the question, "Is the double jeopardy clause of the Fifth Amendment applicable to the states through the Fourteenth Amendment."

Recent court opinions illustrate both an anticipation of and a desire for a reappraisal of this question by the Court.

> While the Court has not yet specifically incorporated the double jeopardy clause no deliberate judicial intention to relegate that fundamental safeguard to some inferior status is manifest; rather, protection

> against double jeopardy has been so fiercely guarded as a basic element of our heritage of freedom and its history so closely parallels that of the other basic values already embedded in our conception of due process, that this court is led ineluctably to the conclusion that its current omission from the Supreme Court's ever-lengthening recital of protections within our expanding notions of fundamental fairness is but temporary and indicates only that the judicial process of redefining constitutional philosophy, though in progress, is as yet, incomplete. *State* v. *Fletcher,* 3 Cr. L. 2154 (Ohio Ct. Com. Pleas).

Similarly, in *United States* v. *Nenna,* 282 F. Supp. 754 (1968) Judge Frankel acknowledged that the "situation may be destined for change as petitioners urge in the near future." 282 F.Supp. 754 at 757, affd. 393 F.2d 416 (2d Cir. 1968). Yet after granting that appellant's claim was both "substantial and interesting," the judge decided that this Court, rather than his, would be the appropriate forum for such a change.

The proceedings in this case were patently inconsistent with the Fifth Amendment prohibition against double jeopardy. The federal standard of when jeopardy attaches is set down in *Downum* v. *United States,* 83 S.Ct. 1033 (1963). With the exception of "extraordinary and striking circumstances," jeopardy attaches as soon as the jury is impaneled and sworn. Jeopardy thus attached during the proceedings against petitioner on the first indictment.

It is true that if a trial fails other than on the merits, and the accused does not seasonably object to the dismissal, a second trial for the same offense will not constitute double jeopardy. *Amrine* v. *Tines,* 131 F. 2d 827 (10th Cir. 1942), *Nolan* v. *United States,* 163 F. 2d 768 (8th Cir. 1947). Yet petitioner herein objected strenuously to the termination

of the initial proceedings; accordingly the trial under the second indictment was in clear violation of the Fifth Amendment.

The potentialities for harassment of a person in petitioner's position, if there is no finding of double jeopardy here, are painfully obvious. Whenever the prosecutor, for whatever reason, concludes that the trial is not proceeding as planned, he has but to withdraw a juror and commence a new proceeding. If, on the other hand, the trial is progressing satisfactorily from the prosecution's point of view, he will let it run its course. A clearer violation of the Fifth Amendment double jeopardy clause would be difficult to imagine.

Respectfully submitted,

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